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No. 25.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ADAMS DAIRY, INC.,

SUPPLEMENTAL BRIEF OF RESPONDENT

In Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

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REASON FOR SUPPLEMENTAL BRIEF.

In early January, 1964, Respondent Adams Dairy, Inc., filed its brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The Court to date has taken no action herein. The recent decision in Fibreboard Paper Products Corp. v. N. L. R. B. — U. S. —which the majority opinion purports to limit "to the facts of this case", makes it appropriate for the Respondent to file this supplemental brief to point out (1) The distinction between the facts and circumstances in Fibreboard and

those here present, and (2) The opinion of the Eighth Circuit is entirely compatible with the standards set forth by this Court in Fibreboard.

Limited Application of the Fibreboard Opinion.

The Solicitor General in his oral argument before this Court, when questioned by Mr. Justice White, stated (Transcript of proceedings before the Supreme Court, p. 44), "If, Mr. Justice White, there is a contract and it says nothing about subcontracting, then we have a **quite different** question, one which may be here in the **Adams Dairy case**, one on which the Board has a number of rules, one which is in my judgment an **intensely different problem**, but that is not here . . ." (emphasis supplied).

The Petitioner's brief (page 9) states that though the basic questions in Fibreboard and Adams are the same, the questions arose in somewhat different factual contexts. Throughout the opinion in Fibreboard, this Court in setting forth its rule concerning "contracting out" uses the phrases "on the facts of **this** case" and "involved in **this** case". The Court's attention must also be called to the inaccurate statement of Petitioner of "questions presented." (See page 2 of the Petition for Certiorari). The Solicitor General misstates the question here to be reviewed when he assumes that Adams "contracts out the work previously performed by a group of his employees." The evidence is to the contrary. Respondent directs the attention of the Court to the fact that the work previously performed by the terminated employees was not "contracted out". Instead, it was wholly discontinued and the terminated employees were not replaced by employees "of an independent contractor to do the same work under similar conditions of employment". The Eighth Circuit opinion refers to "the decision on the part of Adams to terminate a phase of its

business and distribute all of its products through independent contractors" (Petition for Certiorari, Appendix A, page 29).

The undisputed evidence in the Adams case is that it wholly discontinued the delivery of its products to its customers, and with whom it severed all relations. It terminated the delivery phase of its business and sold its milk "dockside" to independent dealers who owned and provided their own trucks and assumed all responsibility to their own customers. It no longer maintained nor had a capital investment in delivery equipment. It established a selling price to its independent dealers who in turn established their own resale prices to the stores.

The distinction between subcontracting and this relationship is manifest. Legally, subcontracting involves the hiring of another to perform work or provide services on behalf of the contractor under whose supervision and control the subcontractor acts. This is far different from the case where a phase of a business is entirely eliminated. The change would be comparable to that where a business operating retail stores and selling by mail order would eliminate the retail stores and conduct its business solely by mail order, or vice versa.

The denial of the Writ of Certiorari here would in no way affect the application of the Fibreboard decision to labor problems henceforth. It is apparent that the Adams case does not involve "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment," which the Court holds "is a statutory subject of collective bargaining under Section 8 (a)." On the other hand, the Adams case must fall within the area that this Court contemplated when it stated in its opinion that "our decision need not and does not encompass other forms of 'contracting out' or 'subcontracting out', which arise daily in our complex economy."

The Bargaining.

A further distinction between Fibreboard and Adams is that Adams according to the record bargained and negotiated three successive contracts with the union between 1954 through 1960 (Petition for Certiorari, pages 14 to 16, incl.). Each time it bargained, the union asked that there be a limitation on the right of the employer to sell its products "dockside." Each time the employer was able to procure an agreement with the union without this contractual limitation. Once during the term of the contract, the union brought a grievance to arbitration over whether the driver of the employees should be paid commissions on dockside sales to customers in their territory and the Arbitrator found for the employer, stating that there were no terms in the contract limiting the company's right to make such sales. Indeed, by 1958, Adams had ten independent contractors buying its milk products dockside.

No failure or refusal to bargain with respect to limiting the dockside sales appears from the record. If the requirements of Section 8 (d) are, as the Board states, twofold, first, to approach the bargaining table in good faith with a sincere desire to reach agreement, and second, not to take unilateral action which impairs the ability of the union to represent the employees, then certainly Adams has met the test. For this Court to say that Adams was under a duty to bargain with the union about its practice to sell dockside during the middle of a contract term under facts shown in the record, would be granting the power to the N. L. R. B. to rewrite contracts that the employer and the union had entered into as the result of good faith bargaining. The Eighth Circuit in the Adams opinion stated (Petition for Certiorari, Appendix A, page 27):

> "In the instant case we have a long history of negotiations between the employer and the union

with reference to the union's desire to have a clause included in their contract preventing the employer from changing over from driver-salesmen employees to independent contractors, the refusal to so agree by the employer and the continuous complaints of the employer that its delivery costs were so high as to create an unfavorable competitive situation with reference to other dairies, plus the employers request for suggestion and cooperation regarding the lowering of delivery costs . . . We hold here that the decision on the part of Adams to terminate a phase of its business and distribute all of its products through independent distributors was not a required subject of collective bargaining."

To apply the Fibreboard decision to the Adams case would do violence to the expression of the Court that, "We are thus not expanding the scope of mandatory bargaining to hold as we do now that the type of 'contracting out' involved in this case is the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment." It would greatly expand the scope of mandatory bargaining to hold that it was necessary to bargain about the utilization of independent contractors after the company bargained and achieved that right in three successive labor contracts. The Respondent liquidated its delivery phase of the business. As observed in the concurring opinion, "Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment though the effect of the decision may be necessary to terminate employment."

Remedy.

The second question presented in the Petition for Certiorari in Adams as in Fibreboard relates to the remedy.

The Court held that the act, "charges the Board with the task of devising remedies to effectuate the policies of the act," subject to limited judicial review. This policy is to promote economic peace and the remedy should not be penal nor impose "an undue or unfair burden on the company."

The Eighth Circuit Court of Appeals held that Adams was not required to bargain concerning the terminating of a phase of its business but, after that decision had been made. 8 (a) (5) did require negotiation with reference to the treatment of the employees who were terminated by the decision. The Court also stated that the remedies fixed by the board were too broad to fit the violation. The Respondent believes that the Eighth Circuit misinterpreted the contract as to severance which was dealt with in a separate section of the labor agreement. Nevertheless, economic peace cannot be served by making an employer reinvest in fixed assets (delivery equipment) that he has disposed of, and by making an employer enlarge the basic scope of the enterprise. Even up to the time the entire business was liquidated in January, 1964, the employer had no retail store customers to whom it could have delivered. Its only customers were the independent contractors.

The Court in the Fibreboard option stated, "This kind of subcontracting falls short of such larger enterpreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be. In my view, the Court's decision in this case has nothing to do with whether any aspects of those larger issues under any circumstances be considered

subjects of compulsory collective bargaining under the present laws."

To compel enforcement of the Board's order under the set of facts of the Adams case would be wholly punitive in nature and would not effectuate the purposes of the Act.

It is therefore respectfully submitted that this Court should deny Certiorari; that in doing so the Eighth Circuit decision would not by reason of the plain distinctions between the facts in these cases, conflict with the holdings in Fibreboard.

Respectfully submitted,

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December 31, 1964.